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Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

October Term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798)

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Questions Presented

1. Does the construction industry proviso to Section 8(e) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(e), legalize a union-signatory Subcontractor Clause — an agreement to conduct a secondary boycott — simply because it is contained in a collective-bargaining contract between a union and an employer in the construction industry and is limited to jobsite work?
2. Did the Court of Appeals misinterpret this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975), by holding that the construction industry proviso to Section 8(e) of the Act privileges broad union-signatory subcontracting provisions which are not designed solely to eliminate jobsite friction between union and non-union workers at a particular construction jobsite?
3. Did Congress intend that the construction industry proviso to Section 8(e) of the Act legalize broad union-signatory Subcontractor Clauses which are not limited in language, purpose, and use to the elimination of friction at the particular jobsites where union and non-union employees work side-by-side?
4. Does Section 8(b)(4)(A) of the Act, 29 U.S.C. §158(b)(4)(A), prohibit a union from engaging in top-down organizing by striking or picketing to force a contractor to execute an agreement containing a union-signatory Subcontractor Clause otherwise protected by the construction industry proviso to Section 8(e) of the Act?

List of Parties to Proceeding Below

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

The caption of the within matter contains a listing of the names of all parties in the proceeding below which is numbered Case No. 80-1798 in this Court.

However, Case No. 80-1798 was consolidated with other cases for purposes of oral argument and decision below, which cases are numbered Case Nos. 80-1808 and 81-91 in this Court.

The parties below in those cases are:

1. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.;
2. Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.;
3. International Union of Operating Engineers, Local No. 701; and
4. National Labor Relations Board.

Listing of Parent and Affiliated Corporations

Case No. 80-1798.

Woelke & Romero Framing, Inc., the Petitioner in No. 80-1798, has no parent, affiliated, or subsidiary corporations.

Case Nos. 80-1808 and 81-91.

To the knowledge of counsel for Petitioner Woelke & Romero Framing, Inc., the following corporations are affiliated with the Petitioners in these two cases:

1. Associated Builders & Contractors, Inc., and its affiliated chapters throughout the United States which are incorporated; and

2. The Associated General Contractors of America, Inc., and its chapters throughout the United States.

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BRIEF FOR PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798)

Petitioner, Woelke & Romero Framing, Inc., respectfully prays that the Supreme Court of the United States review and reverse the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals"), which was entered in this proceeding on April 17, 1981.[1]

OPINIONS BELOW

The judgment and opinion of the limited *en banc* Court of Appeals, which was entered in this matter on April 17, 1981, is styled, *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., etc., et al. v. National Labor Relations Board, et al.*, and is officially reported at 654 F.2d 1301 (9th Cir. 1981). It appears at Pet. App. A.[2]

The prior judgment and opinion of a three-judge panel of the Court of Appeals, which was issued on December 26, 1979, is officially reported at 609 F.2d 1341 (9th Cir. 1979), and appears at Pet. App. B.

The Decision and Order of the National Labor Relations Board ("Board"), which was reviewed by the Court of Appeals pursuant to a Petition for Review filed under 29 U.S.C. §160(f), is officially reported at 239 N.L.R.B. 241 (1978), and appears at Pet. App. C.

JURISDICTION OF THE SUPREME COURT

The *en banc* judgment and opinion of the Court of Appeals was entered on April 17, 1981. No petition for rehearing, or for further hearing before the full Court of Appeals, was filed.

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[1]The within matter was numbered Case No. 78-3468 in the Court of Appeals, and was consolidated for argument and decision in that Court with certain other related cases. The National Labor Relations Board was the Respondent below, and the Unions were Intervenors below.

[2]The opinions and orders below which are to be reviewed in this Court have been reproduced in the Petition for Writ of Certiorari in No. 80-1798, at Appendices A, B, and C. The text reference to them will be "Pet.App." followed by a reference to the appropriate Appendix letter, *i.e.*, A, B, or C.

References to the Joint Appendix herein will be cited to as "J.A., Vol. I" followed by a reference to the appropriate page number.

The Supreme Court's jurisdiction is invoked pursuant to, and rests upon, 28 U.S.C. §1254(1). *See* 29 U.S.C. §§160(f) and 160(e).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§157.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

§158(b)(4)(i) and (ii)(A).

"It shall be an unfair labor practice for a labor organization or its agents — (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);"

§158(e).

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

§158(f).

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or

gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

STATEMENT OF THE CASE

Statement of Facts

Woelke & Romero Framing, Inc. ("Woelke & Romero"), is a framing subcontractor in the building and construction industry in Southern California. (J.A., Vol. I, p. 16.) Insofar as is relevant to this case, it had construction subcontracts with various builders and general contractors calling for Woelke & Romero to perform framing work at certain construction jobsites. (J.A., Vol. I, p. 16.)

Woelke & Romero had had a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions (including Carpenters Local 944 and Carpenters Local 235 ("Unions") which are involved in this case) since 1974. That agreement was due to expire on June 15, 1977.[3] (J.A., Vol. I, p. 17.)

Between June 3 and August 4, the Unions and Woelke & Romero engaged in collective-bargaining for a new agreement. On August 4, the Unions and Woelke & Romero

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[3]All dates are 1977 unless otherwise indicated.

reached an impasse in bargaining[4] over, *inter alia*, the Unions' demand for the following Subcontractor Clauses:

"103.1.1 Definition of Subcontractor. A subcontractor is defined as any person (other than an employee covered by this Agreement), firm or corporation holding a valid state contractor's license where required by law who agrees orally or in writing to perform, or who in fact performs for or on behalf of an individual Contractor, or the subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement."

"103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."

"103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof."

"103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of

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[4]An "impasse" in bargaining has been defined by the Board thusly: "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co., etc.*, 163 N.L.R.B. 475, 478 (1967).

material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement." (J.A., Vol. I, p. 18.)[5]

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[5]The Unions also sought the following additional Subcontractor Clauses which would be immediately effective if the foregoing clauses were invalidated by the Board or a Court:

"103.1 In the event that enforcement of paragraph 103.2 is restrained by issuance of an injunction by a United States District Court upon the petition of a Regional Direction [sic] of the National Labor Relations Board, or otherwise, such provision shall be suspended pending its final adjudication, and the provisions set forth in paragraph 103.3 shall be applicable pending final adjudication thereof.

"103.3 Because of the close relationship between individual Contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), herein called 'jobsite work', and because of the Union's concern that subcontractors who are not party hereto will deprive Union members employed hereunder of work opportunities because of lower labor costs, it is agreed as follows:

"103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

"103.3.2 The Contractor shall require each such subcontractor to weekly supply to the Contractor, who will then upon request make available to the Union a copy of the subcontractor's certified labor costs for such job, and to submit to an audit of those labor costs by a certified public accountant upon request of the Union to confirm compliance with 103.3.1.

"103.3.3 Failure to comply with the foregoing subparagraph 103.3.1 and 103.3.2 shall entitle the Union, notwithstanding Article V, to seek judicial relief, upon written notice to the Contractor and the subcontractor, to compel the suspension of such subcontractor's work until there has been compliance, together with attorney's fees for the bringing of such action. In any such court proceeding, the court shall, if it is thereafter in dispute, determine whether there has been compliance." (J.A., Vol. I, pp. 85-88.)

The collective-bargaining agreement to which Woelke & Romero had been party covered the wide geographic area of the eleven Southern California counties, and was applicable to all construction jobsites at which Woelke & Romero might perform services within that area. (J.A., Vol. I, p. 27.) The new agreement the parties attempted to negotiate would have covered the same geographic area. (J.A., Vol. I, pp. 69, 84.)

During the collective-bargaining sessions, the Unions insisted that Woelke & Romero agree to the same Subcontractor Clauses as previously had been agreed to by the Southern California Conference of Carpenters and the contractor associations who negotiate the Carpenters' Master Labor Agreement. At no time during those collective-bargaining sessions did the Unions express any other reason for their insistence on these provisions. (J.A., Vol. I, p. 23.) Since August 4, no further collective-bargaining sessions have been held. (J.A., Vol. I, p. 18.)

In support of the Unions' demand for, and insistence that Woelke & Romero agree to, the Subcontractor Clauses, the Unions picketed the construction jobsites at which Woelke & Romero was working, inducing individuals employed by various other contractors to engage in work stoppages and refusals to perform services for their respective employers. (J.A., Vol. I, p. 19.)

Proceedings Below

On August 11, Woelke & Romero filed an unfair labor practice charge with the Board alleging that the Unions had violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b)(4)(i) and (ii)(A), by picketing to force Woelke & Romero to enter into the Subcontractor Clauses, which it believed to be violative of Section 8(e) of the Act, 29 U.S.C. 158(e). On September 23, the Board's General Counsel issued a Complaint on the charge, and the matter was later presented to the Board on

a Stipulation of Facts. Oral argument in this and certain other related proceedings was held before the Board in Washington, D.C., on February 23, 1978. On November 13, 1978, the Board issued its Decision and Order finding and concluding that the clauses were not unlawful under the Act, and that the Unions had not violated Section 8(b)(4)(A) of the Act by picketing to obtain them.[6]

On November 14, 1978, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the Act, 29 U.S.C. §160(f), Woelke & Romero filed a Petition for Review of the Board's Decision and Order with the Court of Appeals.

On December 26, 1979, a three-judge panel of the Court of Appeals entered its consolidated judgment and opinion in this and other related cases in *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc., et al. v. NLRB, et al.*, 609 F.2d 1341 (9th Cir. 1979). The three-judge panel reversed the Board in material part and sustained Woelke & Romero's Petition for Review. On January 30,

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[6]When this matter was pending before the Board in 1978, it was consolidated with several related proceedings. Because of their importance in the application of the Act, the Board took the unusual step of hearing seven hours of oral argument with respect to this and the related proceedings, and decided all of them together. *See Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 N.L.R.B. 253 (1978); *Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly & Associates)*, 239 N.L.R.B. 264 (1978); and *International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 239 N.L.R.B. 274 (1978).

The *Schriver* case was thereafter appealed to the U. S. Court of Appeals for the District of Columbia Circuit, and the *Woelke & Romero* and *Pacific Northwest* cases were appealed to the U. S. Court of Appeals for the Ninth Circuit.

The Board's view of this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975) was expressed in its *Woelke & Romero* decision.

1980, the Board and the Unions filed petitions for rehearing, and suggested rehearing *en banc*.

On August 19, 1980, the Court of Appeals granted the petition for rehearing and ordered the matter reheard before a limited *en banc* panel of the Court of Appeals as provided by Public Law 95-486, 92 Stat. 1629, 1633, and Rule 25 of the local rules of the Court of Appeals.

On October 16, 1980, oral argument before a limited *en banc* Court was held in San Francisco, California. On April 17, 1981, the *en banc* Court issued its judgment and opinion.

The Decisions of the Board and Court of Appeals Below

The Board concluded that the Subcontractor Clauses were union-signatory clauses which obligate the employer not to do business with another unless the latter is signatory to the union's agreement. The Board construed them to be secondary in thrust and within the general prohibition of Section 8(e) of the Act because the clauses are addressed to the labor relations policies of employers other than the contracting employer. The Board further found that the clauses were privileged by the construction industry proviso to Section 8(e) of the Act, since they were sought within the context of the Unions' collective-bargaining relationship with Woelke & Romero. The Board concluded, therefore, that the Unions did not violate Section 8(b)(4)(A) of the Act by striking and picketing Woelke & Romero to obtain the Subcontractor Clauses. The Board decided that the subcontracting provisions were privileged by the proviso because:

> ". . . the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem . . ." 239 N.L.R.B. at 250 (Pet.App.C, pp. 97-98.)

The Board rejected the contention that this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), required that the shelter of the construction industry proviso to Section 8(e) be limited only to those secondary jobsite subcontracting agreements which (1) are *both* contained in the context of a collective-bargaining relationship, *and* operational at times and sites at which the employer has employees represented by the union; and (2) do not require bargaining relationships with a particular union. (Pet.App.C., pp. 92-93.) In effect, the Board held that the mere existence of the collective-bargaining relationship between the Unions and Woelke & Romero, without more, was sufficient to give the Subcontractor Clauses legal shelter under the proviso.

The Court of Appeals initially disagreed with the Board. A unanimous three-judge panel of the Court of Appeals held the Clauses outside the proviso, and unlawful, because they were broader than the proviso's purpose and operational even at sites when and where no union workers were employed:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a non-union subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al.*, 609 F.2d 1341, 1347 (9th Cir. 1979). (Pet.App.B, p. 62.)

That decision was later vacated, however, and the majority of a limited *en banc* Court of Appeals, split 7-4, and sided with the Board and the Unions. (Pet.App.A, p. 1.) The majority of the *en banc* Court concluded that the proviso shelters union-signatory Subcontractor Clauses without regard to the presence or absence of union workers at the

jobsite, so long as such Clauses are contained in or sought as part of a collective-bargaining relationship. Further, the *en banc* majority concluded that unions may strike employers to obtain such Clauses.

The *en banc* Court's dissenters concluded that the original panel opinion of the Court of Appeals was correct, and that the *Connell* decision required the view that the proviso sanctioned only those clauses which were *both* in the context of a bargaining relationship *and* operational only at sites when and where union workers worked alongside non-union workers.

SUMMARY OF ARGUMENT

Petitioner contends that the Board and the *en banc* Court of Appeals below misconstrued and misapplied the intent of this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), with respect to the shelter afforded subcontracting restrictions by the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. §158(e). Petitioner believes that the Subcontractor Clauses are illegal secondary boycott agreements prohibited by Section 8(e) of the Act.

The Subcontractor Clauses involved in this case massively restrict a construction employer's freedom to do business with firms that do not agree to organize their employees, and the employees of other employers, from the "top down." Such a massive boycott was not intended by Congress to be sheltered from illegality by the construction industry proviso.

Top-down organizing was carefully limited by Congress in 1959. Construction unions were not given a license to exact representation from unwilling employers or employees by economic coercion. Congress did indicate that construction employers and unions could voluntarily execute "prehire" agreements which might have limited such effect. *NLRB v. Local 103, Iron Workers*, 434 U.S. 335 (1978).

However, Congress carefully limited this exception granted by Section 8(f) of the Act, 29 U.S.C. §158(f). Congress otherwise restricted top-down organizing arrangements by construction unions.

When the 1959 Congress added Section 8(e) and its construction industry proviso to the Act at the same time as it added Section 8(f), it did not intend to permit construction unions to use subcontracting agreements as top-down organizing tools. It did intend to permit some no-subcontracting agreements, but only those which were related to construction unions' common-situs interests on particular jobsites. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra*. Even though some such agreements may, per force, have a top-down organizing effect, this Court reached the balance between the dual Congressional objectives by indicating that such agreements must not be broader than necessary to achieve Congress' purpose in enacting the proviso. *Id.*

The Subcontractor Clauses here are too broad. Their effect is to organize subcontractors, and subcontractors of subcontractors from the top down, and are not related closely to common-situs interests on those particular jobsites where jobsite friction between union and non-union workers who are employed side-by-side may ensue. The Board and the *en banc* Court below, thus, did not apply this Court's previously articulated delicate balance. The Board and *en banc* Court found the Subcontractor Clauses lawful under the construction industry proviso simply because they were contained in the context of a collective-bargaining relationship, without regard to the massive secondary boycott the Clauses endorse and without regard to the broad top-down organizing effect of the Clauses.

Finally, Congress did not intend that construction unions were to be free to obtain Subcontractor Clauses, even those protected by the proviso, through picketing. Since even proviso-protected clauses may have a limited top-down or-

ganizing consequence, it would be contrary to Congress' intent to permit unrestrained picketing for that purpose. More importantly, it is anomalous to conclude that a union can violate Section 8(b)(4)(B) by picketing to compel one to cease doing business with another, but to permit such coercion as long as the cease-doing-business object is contained in a proviso-protected written agreement. Consequently, Section 8(b)(4)(A) must be interpreted to prohibit picketing to obtain even a proviso-protected Subcontractor Clause.

ARGUMENT

A. SUBCONTRACTOR CLAUSES HAVE BROAD TOP-DOWN ORGANIZING EFFECTS AND ARE CALCULATED TO SATISFY UNION OBJECTIVES OTHER THAN WITH THE CONTRACTING EMPLOYER

1. The Subcontractor Clauses Involved Herein Have Broad Top-Down Organizing Effects

Subcontractor Clauses are of many types: (1) ones which obligate a contractor to utilize a subcontractor who matches the total economic labor costs of the union contract; (2) ones which obligate a subcontractor not to accept work on a picketed construction site; (3) ones which obligate the subcontractor to pay the same wages and fringe benefits (*i.e.*, 2 weeks vacation, etc.) as contained in the contractor's union contract; (4) ones which obligate the subcontractor "not to use" materials made in a non-union shop; (5) ones which prohibit subcontracting altogether; and (6) ones, as here, which obligate the subcontractor to be party to the same union contract with the same union as the contractor with whom the subcontractor wishes to do or is doing business. Depending on the language of the precise clause, the effects may be different. Some clauses may have the effect of preserving work, others may simply remove the economic incentive to subcontract, and still others may have "organizing" effects.

The Subcontractor Clauses in this case are broad and of the latter type. The language of the Clauses reveals their effects:

1. They permit, not prohibit, the subcontracting of work normally performed by the contractors' and subcontractors' employees;
2. They apply only to work of the particular contracting union party to the collective-bargaining agreement, and allow free subcontracting of other work;
3. They apply to all tiers of subcontracting;
4. They apply to the entire geographic area covered

by the agreement;

5. They apply *in futuro* to all construction sites on which the contractor may perform work;

6. They apply to the furnishing and installation of material as well as to the performance of labor;

7. They require *all* provisions of the union contract to be observed by the subcontractor, including the provisions requiring compulsory union-membership as a condition of employees' continued employment, the exclusive hiring of workers only from the union's hiring halls, the payment of specified benefits, and the payment into union health and welfare, pension, and other funds;

8. They apply for the entire duration of the agreement;

9. They require the contractor to provide in a written contract with the subcontractor that the subcontractor will comply with the *full* terms of the union's agreement; and

10. They require the subcontractor and his subcontractor to be signatory to the same union contract as the contractor, *viz.*, with the same union, for the same geographic area, and for the same future duration.

In order for a subcontractor, or a subcontractor of a subcontractor, to be eligible to perform services for a firm which is party to such a clause, therefore, the subcontractor must agree to (1) sign the union's contract, (2) force his employees to become members of that union, (3) recognize that union, (4) hire new or additional employees only from that union's hiring hall, (5) be bound by all provisions of that union's contract for its duration, even after the project for which it was executed is completed, and (6) agree to

force these same conditions on its subcontractors, and their employees, both at the current project and all future ones.[7]

Such requirements must be met whether or not the employees desire to be represented by the particular union in question. The decision, therefore, as to whether employees will be unionized, and by which union, is taken from the employees and placed in the hands of the employer. This "top-down" organizational activity, *i.e.*, employers, not employees, are organized and it is the employer who makes the decision whether the employees will be unionized, is backed by a massive boycott of all firms which do not agree to such requirements.

2. Top-Down Organizing Is Contrary to the Basic Objectives of the Act

Section 7 of the Act, 29 U.S.C. §157, expressly gives the right to decide for or against union representation to employees, not to employers:

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[7]The magnitude of the Subcontractor Clauses' effects can be demonstrated in numbers. Suppose General Contractor A has a union contract with Carpenters Union which contains the Subcontractor Clauses, and undertakes construction services for an owner. Suppose, further, that to perform such services, General Contractor A must or desires to subcontract "traditional" carpenters' work (*i.e.*, drywall, rough framing, forming for concrete, lathing, wood roofing, finish carpentry, weatherstripping, insulation, pile-driving, and millwrights' work) to 10 other firms.

To comply with the Subcontractor Clauses, each of the 10 subcontractors that is not already party to that same union contract as is General Contractor A, must sign and abide by it. Thus, from one Subcontractor Clause, springs 10 union contracts and Subcontractor Clauses.

Suppose, further, that General Contractor A performs 10 projects during the life of the union contract containing the Subcontractor Clauses. One Hundred union contracts and Subcontractor Clauses are the result.

And, suppose, further, that General Contractor A is a member of a local multi-employer group which has 200 members all bound to the same contract containing the Subcontractor Clauses. Twenty Thousand (20,000) union contracts could be the result: 20,000 contractors and subcontractors forced to recognize the union, and forced to force their employees to designate the particular union as their representative, in order to work.

> "*Employees* shall have the right . . . to form, join or assist labor organizations, to bargain collectively *through representatives of their own choosing* . . . and . . . to refrain from any or all such activities. . . ." *Id.* (emphasis added).

These statutory rights of employees are given sanction by other provisions of the Act which seek to enforce them. Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain or coerce" employees in the exercise of such rights, and Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), similarly prohibits a union from "restraining or coercing" employees in the exercise of those rights.

In short, the Act places "unionization" decisions in the hands of employees, not unions and employers, and is ". . . wholly neutral when it comes to that basic choice [for or against a particular union.]" *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973).

The normal rule is, therefore, that both a union and an employer commit an unfair labor practice by agreeing to impose union representation upon a group of employees unless a majority of the unit employees have first selected the union as their representative; *i.e.*, minority unions cannot legally enter into collective-bargaining agreements with employers. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961). Top-down organizing is, thus, contrary to the Act's basic objectives.

3. The Exception for Top-Down Organizing in the Construction Industry Was Carefully Limited by Congress

Section 8(f) of the Act, 29 U.S.C. §158(f), is an exception to this rule, and provides, in material part, that the entering into of a union agreement by a construction employer before the union has achieved "majority" representative status among the employees, is not illegal. The exception, how-

ever, is ". . . of limited scope . . ." *NLRB v. Local 103, Iron Workers*, 434 U.S. 335, 345 (1978).

Section 8(f) was added to the Act as part of the 1959 Landrum-Griffin amendments. However, "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Id.* at 346-47; *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra*, at 632 (1975). Section 8(f) was motivated by the unique nature of the construction industry, and by circumstances which Congress thought required that unions and construction employers be allowed to execute "pre-hire" or "minority" contracts. As this Court has remarked:

> "There were two aspects peculiar to the building trades that Congress apparently thought justified the use of prehire agreements with unions that did not then represent a majority of the employees:
>
> 'One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.' H.R. Rep. No. 741, 86th Cong., 1st Sess., 19 1 Leg. Hist. 777 (1959).
>
> The Senate Report also noted that 'representation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers.' S. Rep. No. 187, 86th Cong., 1st Sess., 55 (1959), 1 Leg. Hist. 541-542."

NLRB v. Local 103, Iron Workers, supra, at 348.

The convenience given to construction unions and employers to enter into prehire agreements before the employees had expressed their desires for the union did not, however, mean that construction unions were free to engage

in unlimited top-down organizing. The 1959 Congress also severely restricted organizational and recognitional picketing by the addition of Sections 8(b)(7)(A), (B) and (C), 29 U.S.C. §§158(b)(7)(A),(B) and (C), to the statute. Construction unions were not given any exemption from those proscriptions. Section 8(b)(4) of the Act, 29 U.S.C. §158(b)(4), was amended so as to retain and expand the limitations on secondary boycotts and the "top-down" organizing inherent in use of such boycotts. Construction unions were not exempted from those proscriptions.

Even in Section 8(f), Congress carefully limited the exception for the construction industry. The final proviso to Section 8(f) provides that the normal NLRB contract bar rules would not prohibit the holding of elections during the "prehire" or "minority" contract's term, thereby preserving the ability of employers, employees and unions to utilize the preferred "election route" to designate bargaining representatives. *See* 29 U.S.C. §158(f)(4).

Further, Congress restricted the applicability of Section 8(f)'s shorter 7-day compulsory union membership requirement to the same conditions as exist in other industries by saving the proviso to Section 8(a)(3) and making it applicable to the construction industry, thereby further narrowing the possibility that a minority construction union might discriminate against non-union workers.

Most significantly, Congress spelled out the *limited* nature of agreements validated by Section 8(f). "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle." *NLRB v. Local 103, Iron Workers, supra,* at 348 n.10. The House Conference Report clearly established that no coercion of any sort was to be utilized to exact pre-hire agreements from unwilling contractors:

"Nothing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such pre-hire agreements." H.R. Rep. No. 1147 on S.1555, 86th Cong., 1st Sess. (1959), I, Legislative History of the LMRDA of 1959, p. 946 (hereinafter "Leg. Hist.").

Thus, the 1959 Congress did not intend to permit construction unions to engage in broad top-down organizing campaigns by economic coercion against the primary employer or anyone else. The Board and this Court have acknowledged that the "pre-hire" or minority union contracts in the construction industry cannot be enforced by picketing, such being restricted by Section 8(b)(7)(C) of the Act, *NLRB v. Local 103, Iron Workers, supra,* that such agreement is ". . . merely a preliminary step that contemplates further action for the development of a full bargaining relationship . . ." *Ruttman Construction Co.,* 191 N.L.R.B. 701, 702 (1971), and that that bargaining relationship ". . . is contingent on the union's attaining majority [employee] support at the various construction sites." *NLRB v. Local 103, Iron Workers, supra.*

4. The Limitations on Top-Down Organizing for Construction Unions Are Exceeded by the Subcontractor Clauses Here Which Propel Union Representation on Employees of Other Employers

The careful limits on top-down organizing in the construction industry established by Congress, this Court, and the Board are exceeded by Subcontractor Clauses such as those involved in this case. The Clauses here require either (1) a total boycott of all non-complying employers in a large geographic area for an unreasonable time, giving the Unions a protective net over the construction market, or (2) excessive top-down organizing of all non-union contractors and subcontractors in the area.

The Clauses reach the labor policies of employers *other* than the contracting employer. The Clauses address, not the labor policies of the contracting employer *vis-a-vis* his own employees in their bargaining or contract unit, but the labor policies of those firms with which the contracting employer wishes to do or is doing business. The absence of a union contract, the absence of union recognition, and the absence of union-represented workers in the subcontractor's work force are the elements revealing that the Clauses affect, not the contracting employer's work force, but the work force of other employers. The Clauses, and the boycott requested by them, are, hence, calculated to satisfy the Unions' objective other than in the primary employer's bargaining unit.

Compliance with the terms of the Subcontractor Clauses by a contracting employer's subcontractor, therefore, requires affirmative action to satisfy union objectives other than in the primary employee unit: the execution of a minority union agreement by another contractor with a *particular* union under the economic compulsion of ineligibility to do or obtain the work of the signatory contractor. Per force, the execution of the contract under such circumstances *immediately propels the particular union* and its representation on the subcontractor's employees. "To hold that a labor organization which does not represent the employees of particular employers and an employer who does not directly employ such employees may by contract impose a bargaining representative not of their own choosing upon those employees . . . is contrary to the basic objectives of the Act . . . It creates conditions for future wholesale discrimination." *Northern California Chapter, The Associated General Contractors of America, Inc. (Op. Engrs. Local 3) et al.*, 119 N.L.R.B. 1026 (1957) (Minority Opinion of Members Rodgers and Jenkins), *aff'd sub nom., Operating Engineers Local Union No. 3 v. NLRB*, 266 F.2d 905 (D.C. Cir. 1959), *cert. denied sub nom. St. Maurice, etc. v. NLRB*, 361 U.S. 834 (1959).

As can be seen, these Subcontractor Clauses are top-down organizing tools, virtually unrestricted in effect, which require the coerced designation of a particular union by the employees in other bargaining units. They contain a license for discrimination contrary to the basic objectives of the Act, and contain few, if any, of the elements of the nation's policy favoring collective-bargaining by employees through "representatives of their own choosing."[8]

B. THE SUBCONTRACTOR CLAUSES ARE SECONDARY UNION-SIGNATORY CLAUSES WITHIN THE GENERAL PROSCRIPTION OF ILLEGALITY CONTAINED IN SECTION 8(e) OF THE ACT

The 1959 Congress not only added Sections 8(b)(7) and 8(f) to the Act, but also enacted another provision, Section 8(e), 29 U.S.C. §158(e), rendering illegal so-called "hot cargo" agreements; *i.e.*, agreements to conduct a secondary boycott. The addition of Section 8(e) to the Act was for the purpose of closing what Congress believed was a loophole in the secondary boycott provisions of Section 8(b)(4).

Section 8(e)'s basic thrust was to render illegal those contractual provisions having *secondary* objectives; *i.e.*, agreements whereby the employer ceases or refrains from handling or using the products or services of another. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967); *NLRB v. Enterprise Ass'n., etc., Pipefitters*, 429 U.S. 507 (1977).

Thus, in enacting Section 8(e) of the Act, Congress sought to prohibit the "agreement to conduct a secondary boycott," in effect plugging the loophole thought to have been created

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[8]*See* Burstein, "The 'Hot Cargo' Clause," 11 N.Y.U. Ann. Conf. on Labor, 153, 156-57 (1958), where the author points out that for organizational purposes, hot-cargo agreements have been used most effectively in the construction and transportation industries.

by this Court's decision in *Carpenters Union v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

In *National Woodwork Mfrs. Ass'n, supra*, this Court explained that not all agreements which literally may cause one employer to cease doing business with another were meant to be prohibited by Congress,[9] and stated the test to determine which such agreements were within the Congressional intent and the scope of the Section 8(e) prohibitions:

> "The determination whether the [challenged provision] . . . violated §8(e) . . . cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for this activity to fall within this category, so long as the tactical object of the agreement and its maintenance is *that* employer, thus making the agreement . . . secondary in its aim. *The touchstone is whether the agreement or its maintenance is addressed*

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[9]The provision challenged in *National Woodwork* permitted the union members of the contracting employer not to handle millwork which had been prefabricated at a mill. 386 U.S. at 615 n.2. The Board had found that millwork customarily had been done at the construction jobsite, and the Court found substantial evidence to support that finding. The Court held that the provision was addressed to the labor relations policies of the contracting employer vis-a-vis *his own* employees inasmuch as it related solely to the *preservation of work normally done by the contracting employer's employees;* it merely permitted a strike of the contracting employer's employees in furtherance of their effort to preclude the employer from taking away their normal work. Hence, the provision was primary, not secondary, in thrust, and not within the scope of the general Section 8(e) prohibition. *See NLRB v. Enterprise Ass'n., etc., Pipefitters, supra*, 518-20.

to the labor relations of the contracting employer vis-a-vis his own employees."

386 U.S. at 644-45 (emphasis added) (footnotes omitted).[10]

The distinction between clauses with secondary aims which are within the scope of Section 8(e), and primary clauses which are not, has been spelled out by the Board, as follows:

> "Contract clauses which purport to limit subcontracting to employers who are signatories to union contracts, so-called union signatory clauses, and contract clauses which purport to acquire for bargaining unit employees work which has traditionally been performed by employees of other employers, so-called work acquisition clauses, have been held to violate the Act. Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees covered by the contract, but as directed at furthering general union objectives and undertaking to regulate the labor policies of other employers. Absent a direct relationship to protection of the work of unit employees, such clauses are considered as having an unlawful secondary effect and are proscribed by Section 8(b)(4) and (e).
>
> "On the other hand, however, contract clauses whose basic aims are to limit subcontracting so as to preserve for unit employees work which has customarily been performed by them, or in some instances to recapture work regarded as fairly claimable, so-called

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[10]This Court recently reaffirmed Section 8(e)'s "secondary" v. "primary" distinction. In *NLRB v. Int'l. Longshoremen's Ass'n.*, 447 U.S. 490 (1980), this Court stated:

> "Section 8(e) makes unlawful those collective-bargaining agreements in which the employer agrees to cease doing business with any other person. Although §8(e) does not in terms distinguish between primary and secondary activity, we have held that, [in Section 8(e)] . . . Congress intended to reach only agreements with secondary objectives. (citations omitted)"

> unit protection clauses, and contract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract, so-called union standard clauses, have been held to be lawful. The underlying rationale for the lawful character of unit protection and union standard clauses is that the union has a primary interest in preserving unit work for unit employees and to insure that negotiated standards will not be undermined."

Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al. (California Dump Truck Owners Association), 227 N.L.R.B. 269, 272 (1976).

The Subcontractor Clauses here are addressed to the "secondary," not to the "primary," aims of the Unions. The provisions do not prohibit subcontracting or attempt to "preserve" work or maintain wage standards for Woelke & Romero's employees. Rather, the provisions permit the subcontracting of Woelke & Romero's work, but only to firms which are signatory to, and do the work under, the same Carpenters Unions' contract to which Woelke & Romero is party. The provisions are, therefore, classic "union-signatory" clauses addressed to the labor relations policies of persons *other than* the contracting employer, here Woelke & Romero. *See, e.g., NLRB v. I.B.E.W., Local 769*, 405 F.2d 159 (9th Cir. 1968); *General Teamsters, etc., Local No. 982 (J. K. Barker Trucking Co.)*, 181 N.L.R.B. 515, 519-20 (1970), *aff'd. sub nom., Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971); *Cement Masons Local Union No. 97, AFL-CIO (Interstate Employers, Inc.)*, 149 N.L.R.B. 1127 (1964); *Orange Belt District Council of Painters No. 48 (Calhoun Drywall Co.)*, 328 F.2d 534 (D.C. Cir. 1964).

So viewed, the Subcontractor Clauses are "secondary" provisions within the general proscription of Section 8(e)

of the Act. *Cf. National Woodwork Mfrs. Ass'n v. NLRB, supra; Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1977).

They are illegal under Section 8(e) of the Act because they require Woelke & Romero not to do business with non-complying firms, unless they are saved by the construction industry proviso to Section 8(e).

C. THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE ACT WAS NOT INTENDED TO PERMIT CONSTRUCTION UNIONS TO USE SUBCONTRACTOR CLAUSES FOR TOP-DOWN ORGANIZING PURPOSES

The 1959 Congress did not prohibit *all* secondary boycott agreements when it enacted Section 8(e) of the Act. It exempted certain secondary agreements in the garment and construction industries. Two provisos were added to Section 8(e)'s broad proscription of contractual agreements to achieve secondary aims. "The provisos exempting the construction and garment industries were added by the Conference Committee in an apparent compromise between the House bill, which prohibited all 'hot cargo' agreements, and the Senate bill, which prohibited them only in the trucking industry." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra*, at 628 (1975).

The garment industry proviso exempted *all* forms of secondary agreements and secondary conduct from both Section 8(e) and Section 8(b)(4)(B) in order to counteract ". . . the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors. . . ." *National Woodwork Mfrs. Ass'n v. NLRB, supra*, at 638; *see, e.g.*, 105 Cong. Rec. 6668, 17327, II Leg. Hist. 1377 (1959) (Remarks of Senators Kennedy and Javits). The debates concerning Section 8(e) and the concern for the garment industry rested on the notion that garment industry unions needed to use Subcontractor Clauses for union organizational goals. For example, Senator Javits remarked:

". . . the labor bill now in conference . . . It involves a highly controversial issue which is before us in the resolutions . . . with reference to the garment industry . . . and it deals with the question as to whether unionization of contractors who do work which is farmed out to them . . . shall come under the inhibition of the provisions [of Section 8(e)] of this new labor bill which would prevent unionization from taking place by agreement with the jobber who farms out the work . . .

* * *

". . . This is a long-standing course of business in the clothing industry . . .

* * *

". . . it is readily felt that the elimination of sweatshops in these two industries [garment and men's apparel fields] is heavily attributable to this method of proceeding to unionization . . ."

105 Cong. Rec. 6668, 15951-52, II Leg. Hist. 1384-85 (1959). Senator Goldwater, one of the conferees, responded:

". . . We conferees are in the very peculiar position of everyone of us agreeing that we do not intend to upset the status quo of the garment or apparel industries. . . ."

". . . none of us wants to disturb . . . the status the garment trade now occupies under the present law. . . .

". . . we have tried to develop language to take care of this situation which all of us are sincerely interested in taking care of. . . ."

105 Cong. Rec. 15952, II Leg. Hist. 1385 (1959).

As can be seen from the text of Section 8(e), Congress developed that language, and exempted garment industry "cease doing business" agreements, especially subcontract-

ing agreements, from the general Section 8(e) ban in order to permit their continued use for organizational purposes.

Congress did not reach the same result or utilize the same reasoning with respect to construction industry employers and their "cease doing business" agreements.

"In contrast to the latitude it provided in the garment industry proviso, Congress did not afford construction unions an exemption from §8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 630 (1975). Like the garment industry proviso, the construction industry proviso was added to Section 8(e) in the Conference Committee. Neither the Senate Bill nor the House Bill had contained an exemption. The addition of the proviso was a result of the compromise effectuated in the Conference Committee with respect to the Senate conferees' insistence that the final bill contain a provision dealing with "common-situs" picketing so as to overrule this Court's decision in *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675 (1951). It was ". . . a partial substitute . . ." therefor. *Connell Construction Co. Inc. v. Plumbers & Steamfitters Local 100, supra.*

As to the use of subcontracting agreements as organizing tools for construction unions, "[T]he silence of the sponsors of [the] amendments is pregnant with significance." *NLRB v. Fruit & Vegetable Packers (Tree Fruits Organizing Committee),* 377 U.S. 58, 66 (1964). The silence in the legislative history concerning the use of subcontracting agreements as organizing tools for construction unions lends support to the view that the intent was otherwise. Indeed, since the provisos for the garment and construction industries served different purposes, Senator Goldwater remarked:

> "The exception for the construction industry is only a partial one."

105 Cong. Rec. Appendix A8357, II Leg. Hist. 1827, 1829 (1959). (Extension of Remarks of Hon. Barry Goldwater.)

The construction industry proviso was not explained by Congressional remarks indicating a need for or an interest to preserve building trade union methods of organizing workers from the "top down" by subcontracting agreements. Rather, the construction industry proviso was contained in the *Denver Building Trades* picketing proposal, and linked only to "on site" work on those construction jobsites where common-situs interests were involved. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 629 n.8 (1975).

D. THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) RELATES ONLY TO COMMON-SITUS RELATIONSHIPS ON PARTICULAR JOBSITES

Although the construction industry proviso was not intended to sanction secondary agreements for union organization, it was intended ". . . as a partial substitute for an attempt to overrule . . ." *Denver Building Trades,* inasmuch as the proviso emerged from the Conference Committee having gone into the Committee as part of a common-situs proposal. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 629. The "special problems" in the construction industry upon which the common-situs proposal focused related to the perceived inequities of a construction union not being able to picket a non-union employer at a construction site where more than one employer was simultaneously performing work.

In *Denver Building Trades, supra,* the Court held that the inducement of a complete work stoppage at a common construction jobsite, simply because of the union's dispute there with one non-union employer, was violative of Section 8(b)(4) of the Act. The union had been motivated by a desire to enforce its internal policies against union men working

alongside non-union men at the same jobsite and sought to have those union men cease working alongside the non-union men. *See Denver Building Trades, supra,* 341 U.S. at 692 (Douglas, J., dissenting).

The literal words of the construction industry proviso do not expressly reveal or suggest that to be within the proviso agreements must be related to *Denver Building Trades* policies.

> "This Court has held, however, that §8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment:
>
> > 'It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States,* 143 U.S. 457, 459.' *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 619 (1967)."

Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra. In *National Woodwork Mfrs. Ass'n v. NLRB, supra,* this Court remarked:

> ". . . the construction proviso . . . was intended to be, a measure designed to allow agreements pertaining to certain secondary agreements on the construction site because of the close community of interests there . . ." *Id.,* 386 U.S. at 611-12.

The Court, in making this remark, referenced a decision of the Court of Appeals for the Third Circuit, *Essex County and Vicinity Dist. Council of Carpenters v. NLRB,* 332 F.2d 636 (3rd Cir. 1964), which decision itself focused on the nature of the "close community of interests" at a construction common-situs:

> "This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal

of craft unionists to work alongside non-union men on the same project." *Id.* at 640.

That this was the proviso's intended purpose is demonstrated by the limitation of the proviso to agreements only affecting work on a *jobsite* which is the location of these sporadic work stoppages and the location of common-situs relationships.[11] This reasoning as to the proviso's purpose is shared by the Board and, until now, most Courts of Appeal.

In *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1974), the union contended that contractual restrictions on the contracting out of on-site heavy equipment repair work were privileged by the proviso because such work was to be done at the jobsite. The Court rejected the union's argument and stated:

> "Although the legislative history of the proviso is ofttimes vague and inconclusive what does emerge is an underlying *Congressional concern with minimizing jobsite tension*. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, '*the purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site*.' What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen." *Id.* at 851 (emphasis added).

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[11]The construction industry proviso's purpose was otherwise alluded to by Senator Kennedy on the floor of the Senate in explaining the Conference Report only by a bare reference to "avoiding damage" to collective-bargaining in that industry. 105 Cong. Rec. 17899, II Leg. Hist. 1432 (1959)

Accord, International Union of Operating Engineers, Local 542 (York County Bridge), 216 N.L.R.B. 408, 409 (1979), *enforced*, 532 F.2d 902 (3d Cir. 1976) ("The 8(e) proviso was intended to prevent labor strife among non-union and union employees at the same jobsite"); *Drivers, Salesmen, etc., Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966) ("The purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site"); *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 439 (9th Cir. 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and non-union employees on the same jobsite").

In sum, the legislative history of the proviso's enactment, the past interpretation by the Board, by the Courts of Appeal, and by this Court all reflect that the proviso's purpose was limited to common-situs interests on particular jobsites where union and non-union workers work side-by-side. In keeping with this reasoning, the proviso's sanction for on-site contracting restrictions cannot be broader than the reason for the proviso's enactment.[12]

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[12]In *Connell*, the Supreme Court noted that it had stated that the proviso was "a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the *close community of interests* there. . . .," and that other courts had suggested that the proviso's purpose was narrower: ". . . to alleviate the *frictions that may arise when union men work continuously alongside non-union men on the same construction site*. . . ." 421 U.S. at 629.

Obviously, the "close community of interests" referred to by the Court, includes the narrower "shoulder-to-shoulder" purpose. However, the "close community of interests" purpose is no broader than the purpose behind the 1959 Congressional proposals to overrule *Denver Building Trades*, *see* 421 U.S. at 629, and is no broader than the protection of the common interests shared by all workers at the common situs — ". . . they *work side by side and the wages and working conditions of one trade effect all the others*." II Leg. Hist. 1577 (1959).

Accordingly, the proviso's sanction is clearly no broader than the protection of the union's interest in preventing *jobsite tension* between union and non-union workers over their union versus non-union status or their working conditions when and where they are working side-by-side.

E. THE PROPER INTERPRETATION OF THE CONSTRUCTION INDUSTRY PROVISO MUST ACCOMMODATE BOTH THE CONGRESSIONAL DESIRE TO LIMIT TOP-DOWN ORGANIZING IN THE CONSTRUCTION INDUSTRY AND TO PERMIT COMMON-SITUS SUBCONTRACTING RESTRICTIONS

1. The Proviso Must Be Construed in Pari Materia With Other Congressional Desires

Cognizant of the interests affected by Section 8(e), Congress carefully tailored the construction industry proviso so that it would not affect other provisions of the law then being enacted. *See Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra.* Hence, Section 8(e) and its construction industry proviso must be construed *in pari materia* with the other sections of the statute. As shown earlier, Congress did not intend that construction unions could use subcontracting clauses for top-down organizing purposes, although garment industry unions were free to do so. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 634 n.13.

In view of the reason for its enactment and the simultaneous Congressional concern to limit top-down organizing, the construction industry proviso sanctions *only* those provisions, otherwise within the scope of the general proscription of Section 8(e), which are related to the alleviation of the frictions which may develop at a *particular* common-situs construction project between union and non-union workers, and which do not have broad top-down organizing effects.

Although Congress did not clearly define what specific subcontracting agreements are within the ambit of the proviso, it did not clearly indicate which such agreements were lawful at the time, or would be in the future. The House Conference Report, in detailing the Conference Committee's action with respect to the proviso merely stated "... that the proviso relates only and exclusively to the

contracting or subcontracting of work to be done at the site of the construction . . ." H.R. No. 1147 on S.1555, 86th Congress, 1st Sess., II Leg. Hist. 934, 943 (1959). As to the effect of the proviso on the validity of such restrictive subcontracting arrangements, the Conference Committee was careful to point out that it did ". . . *not intend that this proviso should be construed so as to change the present law* with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project. . . ." *Id.*

The proviso did not then, *ipso facto*, legalize all subcontracting provisions. It was only those provisions relating to common-situs interests and on-site work which were then legal which the proviso was intended to keep from being affected by Section 8(e) illegality. ("To the extent that such agreements are legal today under Section 8(b)(4) . . . the proviso would prevent such legality from being affected by section 8(e). . . ." *Id.*) All the proviso may have done, therefore, was to preserve the then present state of the law as to such agreements without legalizing such agreements if then unlawful. Senator Kennedy, in explaining the proviso as agreed to in conference remarked:

> "The . . . proviso . . . is intended to preserve the present state of the law with respect to . . . the validity of agreements relating to the contracting of work to be done at the site of a construction project."
>
> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor *appear to be* legal today. They will not be unlawful under Section 8(e) . . ."
>
> ". . . It is not intended to change the law with respect to the judicial enforcement of these contracts. . . ."

105 Cong. Rec., 16415, II Leg. Hist. 1433 (1959).

At no time did Congress indicate that it sought to preserve or legalize broad top-down organizing Subcontractor Clauses, however.

2. The Subcontractor Clauses Herein Do Not Relate to the Proviso's Purpose

The Subcontractor Clauses involved in Woelke & Romero's situation are not closely related or limited to the Congressional goals in enacting Section 8(e)'s construction industry proviso. Their broad top-down organizing reach and their failure to be limited to common-situs relationships on those particular jobsites where union v. non-union worker friction may occur, reveals that these clauses are outside the protective ambit of the proviso. The clauses seek to organize not only Woelke & Romero's potential subcontractors, but even the subcontractors of their subcontractors. The clauses name the particular union with which the subcontractors', and their subcontractors', employees must designate as their bargaining representative. The clauses are not limited to any particular common-situs jobsite where the Carpenters Unions might have an identifiable dispute, but apply to *all* future jobsites for the duration of the agreement. The clauses are not limited in language or effect to protecting Woelke & Romero's employees from having to work alongside non-union workers; they allow free subcontracting of all work other than carpenters' work, leaving open the possibility that Woelke & Romero's employees might be employed alongside non-union workers. The clauses do not restrict Woelke & Romero from accepting work at jobsites at which non-union workers might be employed.

It would be unfaithful to the dual Congressional objectives of limiting top-down organizing and permitting secondary agreements limited to common-situs relationships to hold that the Subcontractor Clauses here are sanctioned by the proviso.

3. This Court in *Connell* Sensitively Balanced the Dual Congressional Objectives

This Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* supports, not detracts from, this view. There, this Court was sensitive to the dual Congressional objectives, and achieved a proper balance between them.

In *Connell,* the union (Local 100) demanded that Connell, a general contractor, execute an agreement which would have required that Connell subcontract its plumbing mechanical work only to firms which had agreements with Local 100. When Connell refused to execute the agreement, Local 100 picketed Connell's jobsite to compel its execution. Connell did not normally perform plumbing mechanical work with its own employees, and Local 100 expressly disclaimed any interest in representing Connell's employees. Local 100 sought only a subcontracting agreement from Connell.

This Court, when presented with the question of whether the subcontracting agreement fell within the protection of the construction industry proviso to Section 8(e) of the Act, held that although the agreement appeared privileged by the proviso's words, the agreement was *not* so privileged because the proviso was not intended to protect such clauses:

> "[W]e think its [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships, and in light of Congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships or particular jobsites as well."

Id., 421 U.S. at 633. The Court did not believe that Congress meant to privilege such subcontracting provisions which were literally within the words of the construction industry proviso *if* those provisions were either outside the context of a lawful collective-bargaining relationship, or directed toward, or had the effect of, organizing the con-

tractor's subcontractor's employees from the "top down." The Court stated:

> "If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with 'stranger' contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon and the unions would be free to enlist any general contractor to bring economic pressure on non-union subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.
>
> "It is highly improbable that Congress intended such a result. One of the major aims of the 1959 act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees."

421 U.S. at 631-32.

Connell balanced the competing interests and dual Congressional objectives, and sought to reach an interpretation which best served to effectuate the dual Congressional policies. The fact that the subcontracting agreement was sought "outside" the context of a collective-bargaining relationship demonstrated the breadth of the boycott and the reach of the top-down organizing effect of the clauses. The Court was sensitive to the common-situs interests to be preserved by the proviso, but found none of them furthered by the subcontracting agreement involved. *Id.* at 631.

4. The Board and Court Below Misinterpreted This Court's *Connell* Decision

The errors of the Board and the *en banc* Court below are the failure to recognize and properly apply these balanced interests and Congressional objectives to the Subcontractor

Clauses involved here.[13] The Board rejected the application of this Court's *Connell* decision merely because Woelke & Romero had a collective-bargaining relationship with the Unions. (Pet.App.C., pp. 97-98.) Similarly, the *en banc* Court below concluded that the mere existence of a collective-bargaining relationship automatically privileges such a clause because of the interests of the employees of the employer in maintaining area-wide contract and benefit standards. (Pet.App.A, pp. 23-29.)

Where the employer which is party to a Subcontractor Clause employs no workers at the particular jobsite, the union party to the Clause has no proviso-protected interest. There are no union-represented workers on the common-situs to protect from the frictions which might arise from the simultaneous employment there of unrepresented workers. In that circumstance, the union is as much a "stranger" to the employer as was the union to Connell.

The existence of a collective-bargaining relationship between the employer and the union does not automatically privilege a union-signatory Subcontractor Clause. The presence or absence of union-represented workers at a particular common-situs, is *the* relevant fact. Thus,

> "The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are re-

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[13]The decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, ____ U.S. ____, pet. for rehearing pending, No. 80-1257, is in error for the same reason. Like the *en banc* Court below, the fatal flaw in that Court's decision is its reliance upon the notion that Congress meant the proviso to preserve a pattern of collective-bargaining in the construction industry which assertedly contained broad subcontracting clauses, and to protect area-wide contract standards. *Id.* at 871 and 880.

> lated. It is not sufficient that the restraint serves the interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer." *Pacific Northwest Chapter of ABC v. NLRB, et al.*, 654 F.2d 1301, 1328 (9th Cir. 1981) (Farris, J., dissenting) (Pet.App.A., p. 51.)

The *en banc* Court below justified its conclusion by noting that the Subcontractor Clauses served such union interests as ". . . maintaining wage levels . . . [and] protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions . . ." (Pet.App.A., p. 27.) This justification misconstrues the proviso's limited purpose, and grants to these Subcontractor Clauses a legality not directly related to even the interests specified. The proviso was not enacted to permit unions to maintain area-wide wage levels or benefits unrelated to common-situs interests on particular jobsites. Such interests are "primary" interests which can be protected by provisions directly related to the labor relations of the contracting employer *vis-a-vis* his own employees. Such interests are not ones protected by the proviso because contract provisions involving them would not be within the "secondary" scope of Section 8(e) to which the proviso is an exception. *General Teamsters, Local 386 (Construction Materials Trucking, Inc.)*, 198 N.L.R.B. 1038 (1972); *National Woodwork Mfrs. Ass'n v. N.L.R.B., supra;* see *Local 437, IBEW, et al. (Dimeo Construction)*, 180 N.L.R.B. 420 (1969); *NLRB v. Enterprise Ass'n., Pipefitters, supra*. The interests can be preserved by the parties, through collective bargaining, negotiating provisions which (1) prohibit the subcontracting of work or (2) limit the economic incentive for subcontracting by imposing a requirement on a subcontractor that he maintain total wage-benefit labor costs equivalent to those in the contractor's union agreement.

Further, the *en banc* Court's legitimation of the Subcontractor Clauses permits the vice both Congress and this Court in *Connell* meant to restrict: broad top-down organizing in the construction industry. If the maintenance of contract industry standards needs to be protected, it can be done without either massive area-wide, *in futuro*, boycotts against those employees who prefer not to be represented by a particular union, and their employers, or top-down organizing benefiting the particular union involved.

In order to give credence to the dual objectives of curbing top-down organizing and permitting secondary objective agreements with respect to on-site construction work, a Subcontractor Clause must be carefully tailored in its language, and in its use. These objectives are met only when the clause (1) operates only at a particular jobsite at which union and non-union workers would otherwise work side-by-side, (2) does not name the specific union which must be designated by the theretofore unrepresented workers, (3) does not operate *in futuro* at projects not begun, (4) is in the context of a majority collective-bargaining relationship at the particular jobsite so that the unionized workers can be said to desire the union's protection as to their jobsite interests, (5) does not extend to contractors other than the contractor with whom the union has that relationship, and (6) is not obtained by picketing or other coercive means. Where the clause is broader, it must be considered "outside" the intent of Congress, not protected by the proviso and unlawful under Section 8(e).

Nor are the "practical consequences" identified by the *en banc* Court below justifiable reasons for another conclusion. The practical consequences feared by the Court are: (1) unions would have to ". . . inventory and negotiate over an incredible number of jobsites . . .", which would be ". . . burdensome to the point of impossibility . . .", and (2) ". . . enforcement problems remain severe . . ." be-

cause of the transitory nature of work and a perceived motive for anti-union discrimination. (Pet.App.A, pp. 37-39.)

Neither concern is realistic. The Carpenters Unions in Southern California already must inventory and negotiate with hundreds of employers. (J.A., Vol. I, p. 22.) Policing of compliance with "particular jobsite" clauses would not be that much more burdensome. Further, the collective-bargaining agreement may provide for the contractor to hold a pre-job conference and advise the union of its intention as to subcontracting. Indeed, the old and proposed agreement the Carpenters Unions sought from Woelke & Romero provided *exactly* that. (J.A., Vol. I, pp. 63-64.)

Enforcement problems are likewise more illusory than real. Grievance procedures and arbitration may be utilized to enforce the day-to-day relationship concerning subcontracting, and the Unions' jobsite stewards may be utilized to advise the Union agents of possible impending problems. Such, again, were exactly what the old and proposed agreements provided in Woelke & Romero's case. (J.A., Vol. I, p. 84; R. pp. 51-52.)

Finally, the *en banc* Court should not assume that an employer will flagrantly violate Section 8(a)(3) of the Act by discharging union-represented workers because of their "union" status simply to permit the employer to subcontract work to others. In any event, such discrimination is rectifiable by the union or the employee before the Board.

In short, the parties in collective-bargaining are, or can be, ingenious enough to resolve these perceived problems.

The bottom line of the foregoing analysis is that the mere ". . . existence of a collective-bargaining relationship . . ." *does not clearly* bring ". . . a union-signatory subcontracting agreement within the proviso . . ." as the majority of the *en banc* Court below held. (Pet.App.A., p. 36.)

F. UNIONS MAY NOT COERCE EMPLOYERS TO OBTAIN PROVISO-PROTECTED SUBCONTRACTOR CLAUSES

The *en banc* Courts' decision sustains the Board's view that a construction union can utilize strikes and picketing to obtain a Subcontractor Clause if that agreement is otherwise protected by the construction industry proviso to Section 8(e) of the Act. (Pet.App.A, pp. 40-41.) This conclusion of both the Board and the Court of Appeals is contrary to the legislative history behind the enactment of the proviso and Section 8(b)(4)(A) of the Act, and to common sense. Moreover, this conclusion permits top-down organizing to take place through picketing, clearly contrary to the admonitions previously articulated by this Court.

In this regard, in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* this Court acknowledged the contention that the proviso to Section 8(e) of the Act was intended to permit only *voluntary* jobsite subcontracting agreements. In view of its holding that the agreement there was outside the proviso, this Court did not reach the issue. *Id.*, 421 U.S. at 634 n.14. The foundation for this contention was that Congress intended Section 8(b)(4) of the Act to forbid such picketing. *Id.*

Subsequent to the 1959 congressional amendments which added Section 8(e), its proviso, and a modified Section 8(b)(4)(A) to the Act, the Board construed the legislative history to these Sections to mean that Section 8(b)(4) outlawed *all* picketing or economic coercion designed to force an employer to enter into union-signatory Subcontractor Clauses, even those otherwise protected by the proviso. *Construction, Production, and Maintenance Laborers Union, Local 383 (Colson and Stevens Construction Co., Inc.),* 137 N.L.R.B. 1650 (1962), *enf. denied,* 323 F.2d 422 (9th Cir. 1963). The Board's position in *Colson and Stevens* was fairly straight-forward. It found support in the Conference Report to the House dealing with the enactment of the proviso to Section 8(e) for the proposition that Congress in-

tended for the proviso to permit only voluntarily-entered subcontracting agreements. In the Board's view, if such were entered into involuntarily, they were prohibited by Section 8(e) and the coercion used to exact them would be within the literal proscription of Section 8(b)(4)(A) of the Act. *Id.*, 137 N.L.R.B. at 1651-52.

The circuit courts which considered the issue shortly thereafter disagreed with this view. *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Construction, Production & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963). The Board subsequently agreed with those courts that since Section 8(b)(4)(A) referred to only "agreements prohibited by Section 8(e)," the construction proviso was incorporated by that reference. It, thus, literally permitted picketing and strikes to force a construction employer to agree to a proviso-protected subcontracting clause. *Northeastern Indiana Building and Construction Trades Council (Centrilivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

The prohibitions on the use of coercion to exact "hot cargo" agreements in Section 8(b)(4)(A) emanated from the compromise effectuated in the Conference Committee when the provisos to Section 8(e) and the modifications to Section 8(b)(4) were added. The Senate Bill had contained no modifications to Section 8(b)(4), but did contain restrictions on the entering into of "hot cargo" agreements in the trucking industry. The House Bill contained both a modification to 8(b)(4) and the provision outlawing "hot cargo" or "cease doing business" agreements in *all* industries. The Conference Committee, as noted earlier, added the garment and construction industry provisos to Section 8(e), thereby exempting from Section 8(e) certain secondary "cease doing business" agreements. The Conference Committee, in re-

writing the language of the differing bills, deleted the reference then contained in Section 8(b)(4)(B) of the House Bill prohibiting coercion to force an employer "to agree to cease" doing business with another, and added that language, in different form, to Section 8(b)(4)(A). The House Report on the Conference Committee's work states:

> "The conference committee adopted the provisions of the House amendment [to Section 8(b)(4)] with the following changes: (1) the phrase 'or agree to cease' was deleted from Section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into 'hot cargo' agreements, and therefore their retention in Section 8(b)(4)(B) would constitute a duplication of language." H.R. No. 1147 on S.1555, 86th Cong. 1st Sess., II Leg. Hist. 942 (1959).

Senator Kennedy, in explaining portions of the Conference Committee's report prior to passage of the 1959 amendments, stated:

> ". . . the [construction industry] proviso does not relate to Section 8(b)(4) . . ." II Leg. Hist. 1433 (1959).

The sense of Congress, then, was that Section 8(b)(4) was not to be affected by the construction industry proviso, or by the change in the subsection location as to the prohibition of coercion to obtain "hot cargo" agreements. Coercion, it seems, was not to be permitted with respect to proviso-protected agreements.

In explaining the Conference Report to the House dealing with the enactment of the proviso, Representative Barden, one of the conferees, stated:

> ". . . The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or sub-

contracting of work to be done directly on the site of construction." II Leg. Hist. 1715 (1959) (emphasis supplied).

Although the foregoing is by no means a clear expression that Congress meant to ban coercive conduct to obtain proviso-protected agreements by Section 8(b)(4)(A), the clear intent of Congress to legalize such conduct is also not readily apparent. But, the Conference Report to the House states: "It is not intended that the [construction industry] proviso change the existing law . . . with respect to the legality of a strike to obtain such a contract." H.R. No. 1147 on S.1555, 86th Cong., 1st Sess., I Leg. Hist. 943-944 (1959).

The proviso, of course, could only have changed the law if such activity had been theretofore unlawful. It was. Prior to the passage of the 1959 amendments, the Board had held that picketing to obtain a Subcontractor Clause was illegal under Section 8(b)(4). *See, e.g., Local 47, Teamsters (T. C. Bateson Construction Co., and Texas Industries)*, 112 N.L.R.B. 923 (1955), *enforced*, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 N.L.R.B. 484 (1959), *enforced*, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons, etc. (Selby-Battersby & Company)*, 125 N.L.R.B. 1179 (1959).

Consequently, it appears that Congress did not intend for Section 8(b)(4)(A) to be construed to overrule that body of law by permitting construction unions to picket to obtain binding agreements not to deal with non-union firms for

work at construction sites.[14] Although the literal words of Section 8(b)(4)(A) might appear to privilege union strikes to obtain Subcontractor Clauses, this Court has indicated ". . . that §8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment. . . ." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 628. The same must be true regarding Section 8(b)(4)(A). The circumstances surrounding that section's enactment show that Congress did not clearly express the view that restrictive secondary subcontracting agreements could be obtained by picketing. In addition, it would be anomalous to conclude that the body of Section 8(b)(4)(B) prohibits picketing of neutral employers to achieve a "cease doing business" objective, but that Section 8(b)(4)(A) permits such conduct as long as the union seeks a written agreement which has the same effect, unless Congress had clearly so intended.

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[14]Senator Goldwater noted:

> "Thus, although employers and unions who are under this exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint — economic or otherwise — may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel or to refrain from breaching it.
>
> "The new provision is silent with respect to the lawfulness of coercion or restraint — economic or otherwise — by one party to compel the other party to enter into, or even to bargain about entering into such an agreement. This question was one of those left unresolved by the Board and the courts under Taft-Hartley prior to this new legislation, but now specifically outlawed in all situations not falling within the exemption for the clothing and apparel and construction industries. It is the intention of Congress that the new legislation leave it in the same unresolved status under the building construction industry exemption and that the Board and the courts decide the issue for the building construction industry as if these new amendments contained in section 8(e) had not been enacted and in accordance with the previously applicable law."

II Leg. Hist. 1858 (1959) (Extension of Remarks of Sen. Goldwater).

Further, this Court's decision in *Local 1976, Carpenters Union v. NLRB (Sand Door)*, 357 U.S. 93 (1958) indicates that before the enactment of Section 8(e) and the proviso, coercion could not be utilized to exact "hot cargo" agreements. In its *Sand Door* decision, this Court, in construing whether or not the existence of hot cargo provisions in a collective-bargaining agreement privileged a union to induce a work stoppage to effect a secondary boycott, held that such hot cargo provisions could not be so used. The Court noted that a voluntary employer boycott does not become prohibited simply because of the existence of a hot cargo clause in a collective-bargaining agreement. *Id.*, 357 U.S. at 107. However, the Court stated that an employer must be free to decide whether or not to observe the hot cargo provision in the contract at the time the question of whether to boycott or not arises. *Id.*, 357 U.S. at 105. Most significantly, the Court indicated that a union could not rely upon such provisions to induce a boycott because the contractual provisions may not have been entered into voluntarily. The Court stated:

> ". . . the contractual provision itself may well not have been the result of the choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision might be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." *Id.*, 357 U.S. at 106.

As noted earlier, the 1959 Congress intended to plug the "hot cargo" agreement loophole, and it is unlikely that Congress intended to create another at the same time.

Finally, adherence to the rule by the Board and by the *en banc* Court below which allows construction unions to picket to obtain such Clauses permits a construction union to do that which this Court in *Connell* stated was contrary to congressional intent: to use broad subcontracting agreements as top-down organizing tools by seeking subcontracting agreements from any contractor vulnerable to picketing. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra.* Here, the Unions are and have been at liberty to strike and picket Woelke & Romero because the latter would not agree to take part in the Unions' top-down organizing inherent in agreeing to the Subcontractor Clauses. Woelke & Romero is now, and has been, powerless to resist the Unions' coercive pressure except by executing an agreement containing the Subcontractor Clauses. Section 8(b)(7) of the Act, 29 U.S.C. §158(b)(7), affords no remedy, contrary to the implication of the *en banc* majority below (Pet.App.A, p. 36) inasmuch as that Section applies only to picketing for the purposes of acquiring *initial* union recognition and not to picketing in furtherance of contract demands during an existing bargaining relationship. *NLRB v. Local 103, Iron Workers,* 434 U.S. 335 (1978). The Unions' coercion for the requested top-down organizing agreement is, therefore, unlimited and unrestrained: even though Woelke & Romero had a bargaining relationship with the Unions and did say "No" to them when it was asked to sign a contract containing those provisions, it subjected itself to unrestrained picketing pressure to force it to so agree as a penalty for not agreeing to boycott firms which were unorganized by those particular Unions. This Court has doubted that Congress intended for construction unions to have such unrestrained power. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 631-32.

CONCLUSION

The interpretation of the sanction of the construction industry proviso to Section 8(e) of the Act by the Board and the *en banc* Court of Appeals fails to give sufficient credence to and misinterprets the decision of this Court in *Connell*. Here, the subcontracting provisions on their face are broader than the sanction of the proviso. They are, or should be held to be, illegal under Section 8(e) of the Act.

Congressional concern for the elimination of broad top-down organizing weapons must be balanced against the construction union's interest in protecting its represented workers on the construction site. But, the only legitimate union interest for Subcontractor Clauses under the proviso is to protect union members from having to work alongside non-union workmen at a common construction site. Unless the Subcontractor Clauses in this case are invalidated, they clearly may be used for top-down organizing purposes, purposes other than the legitimate, but narrow, union interest Congress intended to validate.

In sum, Petitioner respectfully suggests that the Subcontractor Clauses here are not privileged by the proviso to Section 8(e), and that the Unions' strike and picketing to obtain them violated Section 8(b)(4)(A) of the Act. In any event, since Section 8(b)(4)(A) reaches even proviso-protected provisions, the Union's coercive efforts to obtain the Clauses violated the Act.

The Court of Appeals' decision should be reversed, and the matter remanded for the entry of an appropriate Order directing the Unions to cease and desist from their conduct, and directing them not to engage in such like or related conduct against Woelke & Romero, or any other firm.

Newport Beach, California.

Dated: November 19, 1981.

Respectfully submitted,

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